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IN THE

Supreme Court of the United States

GARY LOCKE, ET AL.,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; JEWISH COUNCIL FOR PUBLIC AFFAIRS; AND THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Anti-Defamation League

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. As part of its core beliefs, ADL maintains a deep commitment to the principles of religious liberty that are enshrined in the religion clauses of the First Amendment. Based on nearly a century of advocacy and experience, ADL believes that its mission is best achieved by scrupulous observance of the pro-religion values found in those clauses. ADL insists that the Establishment Clause and the Free Exercise Clause occupy equally paramount places in our constitutional pantheon, and both express values of the highest order and deepest significance to our peoples – yet maintenance of the tension between them is essential to the proper working of our democracy.

In advancing the argument here that the Free Exercise Clause does not *require* government funding of religious education on the same terms as the funding of non-religious education, ADL emphatically rejects the notion that this separation is in any way hostile to religion. To the contrary, the wall of separation permits religious practices

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *Amici* have obtained and lodges the written consents of all parties to the submission of this *Amici Curiae* brief. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *Amici* and its counsel, made a monetary contribution to the preparation or submission of this brief.

and beliefs to flourish in America, and protects minority religions and their adherents. The decision of the court of appeals would destroy that separation forever, and would ineluctably entangle state and pulpit. From day-to-day experience serving its constituents, ADL can testify that when government and religion so become entangled, the environment for each grows threatening and problematic. In the familiar words of Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).[2]

Hadassah, the Women's Zionist Organization of America

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's long-standing mission of supporting healthcare institutions in Israel, Hadassah has a proud history of advocating for the rights of the Jewish community in the

[2] In furtherance of the beliefs advanced here, ADL has participated in the major religious liberties cases of the last half-century. *See e.g.*, ADL briefs *amicus curiae* filed in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Boerne v. Flores*, 521 U.S. 507 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Comm. for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

United States. Hadassah is committed to the fundamental principle of separation of church and state, which has served as a guarantee of religious freedom and diversity. Hadassah opposes government funding of religious education, including funding for the training of clergy.

Jewish Council for Public Affairs

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 13 national and 122 local Jewish community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and that the wall of separation between church and state is an essential bulwark for religious freedom in the United States.

The Commission on Social Action of Reform Judaism

The Commission on Social Action of Reform Judaism (CSA) is a joint instrumentality of the Union of American Hebrew Congregations (UAHC) and the Central Conference of American Rabbis (CCAR). The 900 congregations of the UAHC encompass 1.5 million Reform Jews, and the membership of the CCAR includes 1,800 Reform rabbis. The CSA establishes policy for the Religious Action Center of Reform Judaism, an office in Washington, D.C. established to advocate for social and political policy in keeping with Jewish law and theology as understood by Reform Judaism.

As Jews, we have long shared in and benefited from America's unparalleled tradition of religious freedom.

After centuries of harassment and persecution in every corner of the globe, we understand and appreciate that for more than two centuries, America's tradition of religious freedom has been a tremendous gift to people of faith. For much of American Jewry, the struggle to protect religious liberty, to ensure that we, and our neighbors, are free to follow the dictates of our conscience, is a core issue. Our history, so often marked by oppression at the hands of societies intolerant of minority religions, has taught us that we have an obligation to protect religion from governmental interference. In 1991, the UAHC and CCAR reaffirmed our conviction that "the separation of church and state is the bulwark of religious freedom." The UAHC, the CCAR, and the CSA have long urged Congress, the Courts and local officials to protect and defend these fundamental liberties for Americans of all religions.

INTRODUCTION AND SUMMARY OF ARGUMENT

A vibrant Establishment Clause allows religious liberty and free exercise to flourish; it protects members of majority and minority faiths alike. The Establishment Clause is a co-guarantor of religious liberty, not an enemy to it. *See, e.g., Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 256 (1963) (Brennan, J., concurring). While there is an inherent tension between the Establishment Clause and the Free Exercise Clause, *see Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981), it is wrong to conclude that one right should prevail over the other. Rather, it is the appropriate balance between the religion clauses that protects the religious liberties of each of us. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963) (extending unemployment benefits to Sabbatarians protects the free exercise of religion but does not promote the establishment of those protected beliefs). Ultimately governments, including state governments, must have some

discretion in striking the proper balance.

In our poly-theistic society – one that is increasing in diversity with each passing day – the Establishment Clause has a unique role in protecting minority religions. This Court has long recognized that perceived government endorsement of majority religious beliefs, even if indirect, puts subtle but very real pressure on members of religious minorities. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see also Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) (government aid to pervasively sectarian institutions creates a "symbolic link between government and religion, thereby enlisting . . . the powers of government to the support of the religious denomination . . . ."), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997). Majority religions by their nature dominate the landscape. As a result, laws or policies that appear facially neutral may actually redound to the benefit of majority religions to the exclusion of religious minorities. Governments must have the latitude to protect against religious inequality and make ensure democratic protections for members of minority religions.

Here, the State of Washington protects the religious exercise rights of all its citizens by providing greater anti-establishment protections than does the United States Constitution. To that end, Washington declined to fund Davey's training as a minister of his faith. In doing so, Washington did not infringe Davey's Free Exercise rights. Davey is free to pursue his religious calling at the school of his choice, albeit at perhaps a greater expense than if he had received state funding. If Davey succeeds in forcing the state to fund his study of theology, all state denials of religious funding will be subject to Free Exercise challenges. As a result, states could be required to fund a

broad range of religious activity under circumstances that may threaten Establishment Clause goals. At risk is a tipping of the balance between the religion clauses – with Free Exercise being given unprecedented importance at the expense of Establishment Clause principles.

States must be given latitude to protect Establishment Clause values to the same extent they are given room to protect Free Exercise rights. There is sufficient "play in the joints" between the religion clauses to allow for both accommodation of religion and religious equity through separation. A state's interest in preserving and protecting anti-establishment principles is an interest of the "highest order." Washington's state constitution seeks vigorously to avoid any perceived government endorsement of religion and supports the state's special interest in preserving the values of religious equity and non-entanglement for all of its citizens.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS UNSUPPORTED BY ANY REASONABLE READING OF THIS COURT'S PRECEDENTS.

This case is about whether Article 1, section 11 of the Washington State Constitution, and the state statutes and programs implementing its mandate, harm or suppress religion. The Ninth Circuit relies on a serious misreading of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618 (1978). The court ignores the relevant inquiry – suppression of religion – and instead frames the question as whether government has acted neutrally toward religion. Compounding this error, the court overlays onto the Free Exercise inquiry the viewpoint neutrality doctrine found in

Free Speech cases such as *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). Because of these missteps, the Ninth Circuit reaches a conclusion that, if allowed to stand, would create a new, unrestrained Free Exercise Clause while simultaneously eviscerating the Establishment Clause.

A. This Court Has Never Held That the Free Exercise Clause Is Violated By Mere Differential Treatment of Religion.

Mere differential treatment of religious activity – if it does not impose a coercive burden on religious exercise – does not violate the Free Exercise Clause. The Ninth Circuit majority held otherwise, wholly relying on *Lukumi* and *McDaniel*. A parsing of each of those decisions, however, yields the conclusion that the court simply misread both.

The *Lukumi* opinion opens by articulating the bedrock principle of this Court's Free Exercise jurisprudence: "government may not enact laws that suppress religious belief or practice." *Lukumi*, 508 U.S. at 523. This rule "is so well understood that few violations are recorded in [the Court's] opinions." *Id.* At a minimum, this rule means that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. Thus, the Free Exercise Clause concerns itself with whether the object of a law is "religious persecution," imposition of "special disabilities on the basis of . . . religious status," or to "infringe upon or restrict practices because of their religious motivation." *Id.* at 532-33.

These core principles were the concerns at issue in

Lukumi and *McDaniel*. The critical issue in *Lukumi* was whether the state had as its object the "suppression of the central element of the Santeria worship service." *Id.* at 534. The law invalidated in *Lukumi* did, as respondent argues, effectively single out religious activity for differential treatment. But what made the law unconstitutional was that it singled out religious activity by imposing an undeniably substantial burden on religious activity – in the form of a criminal prohibition on a core religious rite. *Lukumi*, 508 U.S. at 546-47. The ordinances in *Lukumi* "had as their object the suppression of religion." *Id.* at 541. Similarly, in *McDaniel*, the critical issue was whether the state was specifically "punishing a religious profession with the privation of a civil right." *McDaniel*, 435 U.S. at 626 (quoting 5 *Writings of James Madison* 288 (G. Hunt ed., 1904)).

Neither *Lukumi* nor *McDaniel* (or any other opinion of this Court) hold that the Free Exercise Clause requires government to be neutral as between religion and nonreligion.[3] As well-illustrated in *Lukumi*, neutrality in the Free Exercise context only arises as a tool to examine whether the purpose and effect of the subject law is to

[3] It is as if the Ninth Circuit has confused the different meanings of the word neutrality in this Court's Establishment and Free Exercise Clause jurisprudence. Establishment Clause neutrality is a weak notion of neutrality; it requires that states "not favor or endorse either religion generally over nonreligion or one religion over others." *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., concurring). Free Exercise Clause neutrality, on the other hand, is much stronger; it prohibits selection, targeting and discrimination against religious practice. *Lukumi*, 508 U.S. at 562 (Souter, J., concurring). Thus, in *Zelman*, an Establishment Clause case, the petitioners claimed that lack of neutrality in the voucher program endorsed religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002). Here, Davey must claim something much stronger and quite different: he must assert that lack of neutrality as between religion and nonreligion has harmed his ability to practice his religion.

suppress religion or restrict religious practice. *Lukumi*, 508 U.S. at 534. *McDaniel* is a unique case that touched not on neutrality (as the Ninth Circuit thought it did), but on concerns that the state constitution punished religious beliefs by depriving ministers of their right to engage in the political process. As such, the Ninth Circuit is wrong when it concludes that the offering of general government benefits that exclude religious use imposes the same kind of disability as those imposed in *Lukumi* and *McDaniel*. The differential treatment of religion does not automatically rise to the level of "a disability on the basis of religious status" within the ambit of the Free Exercise Clause. *Cf. Davey v. Locke*, 299 F.3d 748, 752 (9th Cir. 2002). Simply and clearly, *McDaniel* and *Lukumi* show that lack of neutrality does not *ipso facto* translate into a Free Exercise violation.

B. Davey Has Not Suffered Any Harm Under the Free Exercise Clause.

In light of this Court's Free Exercise standard, no reasonable reading of the facts here show that Davey was harmed by the state's policies. It is beyond dispute that Davey suffered no harm remotely similar to the harms wrought in *Lukumi* and *McDaniel* by the state. The state's denial of tuition assistance neither burdens Davey's religious activity nor suppresses religious expression. Davey is free to pursue his calling as a minister of his faith. Unlike the Church of Lukumi Babalu Aye, Davey's religious practice has not been outlawed by the state; he can attend the school of his choice and study for the ministry. Unlike Minister Paul McDaniel, Davey is not forced to choose between a fundamental civil right and his religious worship.

Davey remains unequivocally entitled to "the right to

preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type" he wants to be. *McDaniel*, 435 U.S. at 626; *see also Davey*, 299 F.3d at 762 (McKeown, J., dissenting) ("Neither Davey nor the majority seriously contends that either [provision] was intended to suppress religion. And, because Davey was still able to pursue his chosen major in the absence of funding, he would be hard-pressed to argue that either of these provisions has the unintended effect of suppressing his religious exercise."). Davey's right to study, learn and practice his religion are entirely unaffected.

In sum, it is very telling that regardless of how this Court rules in this matter, Davey is able – fully and freely – to practice his religion openly and unencumbered by the law. The same could not have been said for McDaniel or the Church of Lukumi Babalu Aye.

C. The Ninth Circuit Would Have This Court Remove All Limits on the Free Exercise Clause.

1. The Free Exercise Clause Does Not Require the Government to Fund Religious Exercise.

This Court has never interpreted the Free Exercise Clause as a source for claims for government benefits, monetary or otherwise. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). More broadly, there is simply no precedent mandating that states fund the exercise of fundamental rights, much less the exercise of religious practices.

Indeed, this Court has held that there is no right to

government funding of the political process or for a woman to exercise her right to abortion. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *see also Davey*, 299 F.3d at 764 (discussing that Davey has the constitutional right to become a minister, but he does not have the right to government funding of that pursuit) (McKeown, J., dissenting). Funding is not required even if the lack of funding puts some restrictions on the actual exercise of that right.

This principle is especially well-grounded in the jurisprudence of the Free Exercise Clause. The Court has never held that the Free Exercise Clause is implicated by a simple failure to facilitate religious exercise, whether by funding or through some other form of assistance. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 391 (1990) (holding that a tax decreasing the amount of money available for religious activities does not put a substantial burden on religious worship for purposes of the Free Exercise Clause); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) (holding that there was no Free Exercise violation where tax code effectively made religious practice more expensive); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) (holding that denial of tax benefits to religious schools that discriminate does put a financial burden on those schools but does not violate the Free Exercise Clause). Nor has the Court held that Here, Davey is free to pursue his calling as a minister of his faith. Thus, any differential treatment in funding does not result in a Free Exercise violation.

2. The Limited Public Forum Doctrine Has No Applicability Here.

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995), does not compel funding of Davey's education as a minister. *Rosenberger* was decided on free speech grounds, and stands only for the proposition that states may not discriminate against religious speech in a limited public forum. *Id.* The *Davey* majority attempts to expand *Rosenberger* beyond its limits by denominating the Promise Scholarship as a fiscal forum subject to the viewpoint discrimination rules of free speech cases. *See Davey*, 299 F.3d at 755-56. The *Davey* rationale, if accepted, would raise serious questions about the nature of limited public forums. For example: Do governments create a fiscal forum whenever they institute a spending program? Is a state budget a fiscal forum? Is a school district budget a fiscal forum? *But cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (holding that NEA grant program is not a limited public "forum" triggering free speech rights for grant applicants). As a practical matter, this extension of the limited public forum doctrine would open countless state funding decisions to legal challenge.

As legal precedent, *Rosenberger* has little value here. This Court has recently explained that the limited public forum doctrine only applies when the purpose of a government program is to promote private speech. *United States v. Am. Library Ass'n, Inc.*, 123 S. Ct. 2297, 2309 n.7 (2003) (plurality opinion) (holding that library internet terminals are not a public forum).[4] Here, the purpose of the

[4] Justice Breyer agreed in his concurrence that the public forum doctrine was inapplicable to the case. *Am. Library Ass'n*, 123 S. Ct. at 2310 (Breyer, J., concurring).

Promise Scholarship is to facilitate college attendance and strengthen the state's economy, not to encourage private speech. The scholarship program does not create a limited public forum and therefore raises no issue of viewpoint discrimination. *Id.*[5]

D. If This Court Accepts Davey's Position, States Will Be Flooded With Litigation, Endangering the Heart of the Nation's Social Services System.

Under the Ninth Circuit's rationale, any state funded program may create a limited public forum for competing viewpoints and states would be required to allow religious organizations to participate. The problem is likely to be especially pronounced in the context of social-service providers. As this Court is undoubtedly aware, there is an active and unresolved debate over government funding of pervasively sectarian organizations for the delivery of social services.[6] The "charitable choice" movement, as it is commonly known, would allow pervasively sectarian groups to compete for government contracts on equal footing with other providers. Under the 1996 Welfare

[5] *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), is inapposite here for the same reason. "*Velazquez* held only that viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers.*'" *Am. Library Ass'n*, 123 S. Ct. at 2309 n.7 (quoting *Velazquez*, 531 U.S. at 542) (emphasis in original).

[6] On April 11, 2003, the Senate passed S. 476 also known as the CARE Act of 2003. The CARE Act expands tax incentives for individuals to support both religious and nonreligious charities without voiding charities' obligations under existing civil rights law. Some of the most controversial provisions of the bill were excised before passage, such as allowing faith-based organizations that discriminate in hiring on the basis of religion to receive federal funds.

Reform Statute, states have the discretion to contract with faith-based organizations to provide social services, but are not required to do so. *See* 42 U.S.C. § 604a *et seq.* *Amici* oppose "charitable choice" because it requires people of all faiths to fund organizations with which they may have serious disagreement. *See Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring). And the dominance of majority religious groups indicates that it will be functionally impossible for governments to administer "charitable choice" programs without violating both the Establishment Clause and the Free Exercise Clause.[7]

In addition to the Constitutional concerns, the Ninth Circuit's fiscal forum rationale may lead to legal challenges to each and every funding decision a state makes. Beneficiaries of state social services may try to insist that their Free Exercise rights are violated if they do not receive services from religious providers of their choice. *See, e.g.*, *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 965-66 (W.D. Wis.) (drug rehabilitation program has third-party standing to raise free exercise claims of its participants), *on reconsideration in part*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th

[7] The controversy over "charitable choice" programs is no chimera. It is real. The Pew Research Center for the People and the Press reported in a 2001 survey that Americans expressed general enthusiasm for the idea of faith-based groups receiving funds from the government to provide social services. The Pew Research Center for the People and the Press: *Faith Based Funding Backed, But Church-State Doubts Abound*, 1 (Apr. 10, 2001), *at* http:people-press.org/reports. But that general enthusiasm did not extend to all religious groups equally. Forty-six percent of those surveyed opposed Muslim or Buddhist groups receiving government funding. *Id.* Forty-one percent of people in the study also opposed the participation of the Mormon church in government aid programs. *Id.* The survey showed a clear bias for Judeo-Christian groups as providers, with substantial doubt as to whether non-Judeo-Christian organizations should be allowed to compete for government funds at all. *Id.* at 12-13.

Cir. 2003). Moreover, religious organizations will demand equal access to payment of state funds.

The legal morass would only compound the severe budget crises that many states are facing. State governments, faced with limited resources, will be forced to choose among applications from various religious organizations, funding some at the expense of others. The courts will be forced to demarcate the boundaries of *Davey*'s new fiscal forum doctrine, deciding how states must allocate and structure their limited resources for social services. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-41 (1973) (providing that courts should defer to states' discretion in allocating their own funds).

Moreover, states seeking to preserve the Establishment Clause values of non-entanglement and non-endorsement will be caught in an untenable situation, squeezed between competing mandates. Many states may have no choice but to shut down their so-called "fora" entirely, to avoid litigation over the distribution of funds. This supposition is hardly hypothetical. When faced with the Supreme Court's jurisprudence on access to schools for religious groups and the prohibitions of the state constitution, Washington educators began to ask this very question: "are school districts required to deny all access to school facilities for non-curricular student groups in order to comply with both state and federal law?" Wash. Op. Att'y Gen. No. 3, (Mar. 23, 1995) *at* 1995 WL 152854. And while the consequences of denying after-school access to student groups may be acceptable, the consequences of state withdrawal from the provision of social services to the needy are not. *Davey's* holding that a discretionary state funding program creates a limited public forum could have severe consequences for state governments and their most at-risk constituents.

II. THE NINTH CIRCUIT'S DECISION UNDERMINES THE BALANCE BETWEEN THE FREE EXERCISE AND ESTABLISHMENT CLAUSES.

Because Davey has no right to funding of his religious activities, *Amici* do not believe that Washington has burdened his Free Exercise rights. But even if it had, the imposition of that burden would be justified by Washington's interest in vindicating the religious equality and non-entanglement values protected by the Establishment Clause.

A. This Court's Precedents Give Governments Discretion to Protect Free Exercise Values Without Violating the Establishment Clause.

A state's failure to accommodate religious exercise rarely rises to the level of a Free Exercise Clause violation. *See Employment Div. v. Smith,* 494 U.S. 872, 881 (1990). But as this Court has long recognized, that does not mean that the states are precluded by the Establishment Clause from making special efforts to protect religious activity and Free Exercise Clause values. *See Walz v. Tax Comm'n,* 397 U.S. 664, 673 (1970) ("The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause."); *see also Smith*, 494 U.S. at 890 ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even desirable, is not to say that it is constitutionally required. . . ."). In other words, even when the Free Exercise Clause would not otherwise be violated, a state may, at its discretion, act to maximally and robustly protect Free Exercise values.

In practice, this rule means that governments may exempt religious organizations and entities from generally applicable burdens and legal requirements, even if they are not required to do so by the Free Exercise Clause. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding broad Title VII exemption for religious organizations); *Walz,* 397 U.S. at 680 (upholding tax exemption for religious organizations). Under other circumstances, singling out religious organizations for favorable treatment would appear to violate the Establishment Clause. But when the government acts in an effort to protect Free Exercise values, the Court has held that the Establishment Clause should not stand in the way. *Amos,* 483 U.S. at 339. This result occurs because there is some space between the competing mandates of the twin religion clauses – "a play in the joints." *Walz,* 397 U.S. at 669. It is this space that permits discretionary government action to robustly protect religious rights.

B. Governments Also Must Have Discretion to Protect Establishment Clause Values Without Violating the Free Exercise Clause.

A state's interest in adhering to a strong separation of church and state is undeniably of the "highest order." Indeed, this Court has recognized already that the government may have a "compelling interest" in upholding the Establishment Clause. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001). That interest extends to promoting and protecting the values underlying the Establishment Clause.

Even if extending funding to theology degrees would not amount to a violation of the Establishment Clause, Washington should have the discretion permissively to promote and protect Establishment Clause values.

Protecting against religious inequality and harmful state entanglement with religious institutions is at least as important a state interest as those deemed "compelling" under this Court's Free Exercise jurisprudence. For instance, the Court has denied Free Exercise claims on the ground that states have compelling interests in maintaining the social security system, protection of children, and raising of armies. *See e.g., United States v. Lee*, 455 U.S. 252 (1982) (social security system); *Gillette v. United States*, 401 U.S. 437 (1971) (selective service); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (distribution of pamphlets by children). In each of these cases, the state's interest, based in statutory law or societal values, was sufficient to override an individual's Free Exercise rights. There is no reason why the state's interest in protecting core constitutional values, as reflected in the Establishment Clause, should be given less stature.

If the Constitution gives states discretion to robustly protect Free Exercise values – even when those actions would otherwise violate the Establishment Clause – there is no reason to deprive states of a comparable zone of discretion to protect Establishment Clause values. States are often forced to make policy decisions that lie at the intersection of the Free Exercise and Establishment Clauses: they are required to "chart a course that preserve[s] autonomy and freedom of religious bodies while avoiding any semblance of establishment." *Wisconsin v. Yoder,* 406 U.S. 205, 221 (1972) (quoting *Walz v. Tax Comm'r*, 397 U.S. 664, 672 (1970)). States have been given increasing flexibility to experiment in matters of religion. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). States need precisely the same latitude when they act to protect Establishment Clause values. *See Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting). ("[J]ust as there is room under the

Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion."). The *Davey* dissent puts it best:

> [F]ederalism concerns should [not] represent a one-way street when it comes time for a state to decide whether to enter into the ill-defined terrain of the Establishment Clause's jurisprudence.
>
> . . . [T]he State of Washington's decision not to "experiment" in the funding of religious indoctrination should represent an equally valid concern – both as a matter of federalism and with respect to the more explicit limitations of the Religion Clauses.

Davey, 299 F.3d at 768 (McKeown, J., dissenting).

C. Washington Has a Special Interest In Preserving the Force of Its State Constitution Establishment Clause.

Washington's policy choice to provide greater anti-establishment protections than the United States Constitution is codified in its state constitution. Article I, § 11 of the Washington Constitution provides:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify

> practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .

This provision was "created to protect religious freedom, not to prevent it." *Gallwey v. Grimm*, 48 P.3d 274, 295 (Wash. 2002) (Johnson, J., concurring). Washington's long-standing choice not to provide state funding for the training of ministers was not born out of religious hostility, but rather from the desire to provide the greatest amount of religious freedom for all of its citizens. *Gallwey*, 48 P.3d at 286 (quoting *Perry v. Sch. Dist. No. 81*, 344 P.2d 1036 (Wash. 1959)) ("It was never the intention that our constitution should be construed in any manner indicating any hostility toward religion."); Wash. Op. Att'y Gen. No. 3, (Mar. 23, 1995), *at* 1995 WL 152854 ("The purpose of article 1, section 11 was not to denigrate, repudiate, or isolate religion, such as by confining religious practices exclusively to private property, but to protect and enhance religious liberty, by assuring that every citizen could follow his or her own faith without fear of government entanglement"). As the *Davey* dissent so aptly pointed out, "Washington's decision not to fund religious education simply reflects its strong desire, as reflected in its constitution since ratification in 1889, to insulate itself from the appearance of endorsing religion." *Davey*, 299 F.3d at 762 (McKeown, J., dissenting).

Washington's concerns are completely consistent with the Free Exercise Clause, even assuming that one individual's exercise rights may be diminished. Because no public funds are to be appropriated for "religious worship, exercise or instruction," Washington taxpayers are

not "put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989). Thus, this case is not necessarily a conflict between the federal Free Exercise rights of one individual and a state establishment clause. Rather, this case is at the intersection of free exercise rights of one individual and the overall free exercise rights of the people of an entire state, as evidenced by their chosen state constitution. The Washington constitution embodies the special interest that the state has in preserving Establishment Clause values – to protect religious minorities, to avoid any perception of entanglement, and to protect the Free Exercise rights of each and every one of its citizens by erecting a more stringent wall between church and state.[8]

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[8] Contrary to Justice Thomas' concurrence in *Zelman*, the Establishment Clause as well as the Free Exercise Clause "protect[] individual liberties of religious worship." It is undisputedly settled that the 14th Amendment incorporated the Establishment Clause against the states and it is also well established that the liberties protected by the Establishment Clause are the exact same liberties that the 14th Amendment was meant to protect. *See Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). This is consistent with Madison's interpretation of how the wall between church and state served to protect free exercise liberties, and is even more relevant today, in our poly-theistic society. *See generally*, *Zelman*, 536 U.S. at 717 (Breyer, J., dissenting). But, if Justice Thomas' argument were to be taken at its face value – that the federal Establishment Clause does not apply to the states (an argument that *Amici* strongly disagree with) – the inevitable result must be that states would have the ability to fashion their own establishment clauses in response to citizen concerns and that the limits of the federal Establishment Clause cannot constitute the *de facto* limits of state establishment clauses.

This Court should accord special deference to state interests that, like Washington's interest in protecting Establishment Clause principles, are codified in state constitutions. Of course, a state interest does not automatically become "compelling" for federal constitutional law purposes simply because it is included in a state constitution. But when a state like Washington so highly values a particular interest that it is prepared to elevate it to constitutional status, this Court should be especially reluctant to second-guess the state's judgment. And that principle should apply with special force in this context. Washington's defense of its practices is not opportunistic or arbitrary. Rather, it reflects the state's long-standing commitment to Establishment Clause values codified in its constitution.

D. The Interests at Stake Here Are Not Limited to the State of Washington.

A decision here will necessarily affect the laws, regulations and policies of a large number of states, beyond Washington, that have similar constitutional provisions. In fact, a majority of states have constitutional provisions similar to the one at issue here, which restrict state funding of religious education.[9] These provisions are commonly

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[9] Scholars place the number of these "Blaine Amendments" in state constitutions between twenty-nine and thirty-three. *See* Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 123 n.32 (Feb. 2000) (compiling research of five legal scholars and concluding that there are approximately thirty Blaine Amendments in state constitutions). A "relatively expansive list" of state constitutional amendments representing Blaine Amendments encompasses the following state constitutional provisions: Alaska Const. art. VII, 1; Ariz. Const. art. II, 12; Cal. Const. art. IX, 8; Colo. Const. art. V, 34, art. IX, 7; Del. Const. art. X, 3; Fla. Const. art. I, 3; Ga. Const. art 1, 2, P VII; Haw. Const. art. X, 1; Idaho Const. art. IX, 5; Ill. Const. art. X, 3; Ind. Const. art. I, 6; Ky. Const. 189; Mass. Const. art. XVIII; Mich.

referred to as Blaine Amendments – their name originates from Senator James Blaine's attempt to obtain passage of similar federal language in 1875. Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 Hastings Const. L. Q. 451, 468-78 (1988). And like Washington, many states interpret their Blaine Amendments as providing greater protections to their citizens than the federal establishment Clause.[10] A number of states hold that activities that would not violate the federal Establishment Clause – such as loaning textbooks to religious schools, providing transportation to religious schools and indirect funding of religious education – are nevertheless prohibited by the anti-establishment provisions of their state constitutions. *See, e.g., Elbe v. Yankton Indep. Sch. Dist.*, 640 F. Supp. 1234, 1237 (D.S.D. 1986) ("Recognizing the policy of comity, this court accepts the determination of the South Dakota Supreme Court and holds that the textbook loan statutes are in fact unconstitutional on their face, under Article VI, Section 3, and Article VIII, Section 16, of the South Dakota Constitution."); *Witters v. State Comm'n for the Blind*, 771

Const. art. VIII, 2; Minn. Const. art. I, 16, art. XIII, 2; Mo. Const. art. IX, 8; Mont. Const. art. X, 6; Neb. Const. art. VII, 11; N.H. Const. pt. II, art. 83; N.M. Const. art. XII, 3; N.Y. Const. art. XI, 3; N.D. Const. art. VIII, 5; Okla. Const. art. II, 5; Or. Const. art. I, 5; Pa. Const. art. III, 29; S.C. Const. art. XI, 4; S.D. Const. art. VI, 3; Tex. Const. art. I, 7; Utah Const. art. I, 4, art. X, 9; Wash. Const. art. I, 11; Wis. Const. art. I, 18; Wyo. Const. art. I, 19. *Id.* (list includes thirty-two states).

[10] Among states with Blaine Amendments, twelve have indicated that they have a stricter standard of separation than the First Amendment of the federal constitution. *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 681 n.110 (1998). These states are Alaska, California, Delaware, Hawaii, Idaho, Michigan, Minnesota; Missouri, Nebraska, South Dakota, Virginia, and Washington. *Id.*

P.2d 1119 (Wash. 1989) (holding that extension of tuition assistance to theology students was prohibited by Washington state constitution); *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 964 (Cal. 1981) (holding that textbook loan statute was unconstitutional under Art. IX, § 8 and Art. XVI, § 5 of the California Constitution because those provisions "do not confine their prohibition against financing sectarian schools in whole or in part to support for their religious teaching function, as distinguished from secular instruction"); *Epeldi v. Engelking*, 488 P.2d 860, 866-67 (Idaho 1971) (concluding that framers of Idaho constitution "intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution," and "a state has sufficient latitude under the Fourteenth and First Amendments to uphold its policy against aid to religion although by doing so free exercise of religion (attending parochial schools) becomes more expensive.").

While these amendments are often criticized as being the product of anti-Catholic animus, neither Davey nor the Ninth Circuit contended that the Washington constitutional provision at issue was enacted to suppress religion. *Davey*, 299 F.3d at 762 (McKeown, J., dissenting). Indeed, the actual legislative history of Washington's Blaine Amendment shows that the state saw it as a way to protect the Free Exercise rights of all of its citizens.[11] *See Gallwey v. Grimm*, 48 P.3d 274, 295 (Wash. 2002) (Johnson, J., concurring); Robert F. Utter & Edward J. Larson, *supra* at

[11] James Blaine, himself, said that the federal proposal, which ultimately formed the basis for the state Blaine Amendments, was meant to be "fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious faith and conscience of every man free and unmolested." Robert F. Utter & Edward J. Larson, *supra* at 473 n.110 (quoting C. Balestier, *James G. Blaine: A Sketch of His Life* 59 (1884)).

468-78 (noting that state constitutional delegates recognized the importance of religion in general to society, but sought to avoid government support of sectarianism).

Despite the vigorous debate over the historical record, there are legal reasons to refuse to consider the origin of these amendments. Any initial animus in the amendments has been purged by years of Washington's reaffirmation to the principles of separation of church and state. For example, the provision before the Court – Article I, § 11 of the Washington Constitution – was amended in 1903, 1957 and 1993. *See, e.g.*, Amendment 88, 1993 H.R. J. Res. 4200, p. 3062 (Approved November 2, 1993). The 1903 amendment directly added to the clause in question a proviso relating to the state's employment of chaplains: "Provided, however, that this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, or for such of the state reformatories as in the discretion of the legislature may seem justified." Having been thus reconsidered and reauthorized, the Amendment is purged of whatever taints may have existed in the 1880s.

Moreover, the mere fact that a law originally may have had a discriminatory purpose should not be permitted to abrogate the neutral role that those laws have come to play in our poly-theistic society. *Cf. McGowan v. Maryland*, 366 U.S. 420, 445 (1961) ("The present purpose and effect of most [Sunday closing laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than

one of mere separation of church and State."). As the diversity of religious belief and practice has grown in this country, so too has the important protections that the Blaine Amendments offer. The Blaine Amendments provide states with critical tools to protect Establishment Clause values.

CONCLUSION

Amici respectfully submit that the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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